UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: CRISTAL USA, INC., Respondent, And INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Charging Party.	:	Case No. 08-CA-200330

RESPONDENT CRISTAL USA, INC.'S CROSS MOTION FOR SUMMARY JUDGMENT

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Pursuant to Section 102.24(b) of the Board's Rules and Regulations and under the legal standard readopted in *PCC Structurals, Inc.,* 365 NLRB No. 160 (Dec. 15, 2017), Respondent Cristal USA, Inc. ("Cristal" or the "Company") respectfully moves the Board for an order: (1) granting summary judgment in its favor; (2) dismissing the General Counsel's Complaint; (3) vacating the Certification of Representative in the representation case out of which this case arose, Case 08-RC-184947 (the "TiCl4 R-Case"); and (4) dismissing the election petition filed in the TiCl4 R-Case by the International Chemical Workers Union Council of the United Food & Commercial Workers International Union (the "Union").[1]

The grounds for this Motion, which the Memorandum that follows set out more fully, are that when evaluated under the traditional community of interest standard to which the Board

[1] Cristal has also filed a Cross Motion for Summary Judgment in the companion case to this one, Case 08-CA-200737, which the Company has moved the Board to consolidate with this case.

returned in *PCC Structurals,* instead of, as it was, the standard adopted in the Board's now defunct decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the evidence presented at the hearing in the TiCl4 R-Case demonstrates that no genuine issue of material fact exists precluding a finding that the unit of TiCl4 operators in which the Regional Director directed the election won by the Union in the TiCl4 R-Case is inappropriate. Because the unit is inappropriate, it necessarily follows that the Regional Director improperly certified the Union as the representative of the employees in the unit, and Cristal is not now and has never been obligated to recognize and bargain with the Union as the representative of those employees. Accordingly, the General Counsel's Complaint must be dismissed and the outcome in the TiCl4 R-Case undone by revoking the Union's certification and dismissing the Union's election petition.

MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

Cristal is part of a family of companies that manufactures titanium dioxide products internationally on five continents. In Ashtabula, Ohio, the Company operates two plants, known as Plant 1 and Plant 2, on 140 acres just south of Lake Erie. Each plant produces purified titanium dioxide (TiO2) for sale to various markets. They do so through a system that uses chlorine to react with titanium-bearing ores, in a high temperature process, to create titanium tetrachloride (TiCl4), which is condensed and purified, and then oxidized to create TiO2. After that process is completed, the TiO2 is finished, packaged, warehoused and shipped to customers. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp.37-49, Exs. 5-6).[1]

[1] References to the exhibits to the General Counsel's Motion for Summary Judgment in this case are abbreviated, "G.C. Ex. __," followed, where applicable, to references to the exhibits from the

Local 7334 of the United Steelworkers Union has represented a wall-to-wall unit of production and maintenance employees at Plant 1, which employs around 250 employees, since the 1960s. In 2008, the Steelworkers, the first union to do so, filed a representation petition seeking to represent the employees of Plant 2, which employs around 220 employees. In Case 08-RC-16951, Cristal and the Steelworkers entered into a stipulated election agreement calling for an election at Plant 2 in a unit, as at Plant 1, of all production and maintenance employees. The Steelworkers lost the election. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 34-35, Exs. 15-17).

Eight years later, in the fall of 2016, the International Chemical Workers Union Council of the United Food & Commercial Workers International Union (the "Union") became the second union to attempt to organize the Plant 2 employees. The story that the Union's conduct tells is one of a union that, despite trying, was unable to garner support among a majority of the plant's employees but able to find it in a couple small subgroups, and that decided to take advantage of the opportunity *Specialty Healthcare* gave it to seek to gain a foothold in those subgroups. (Cristal Ex. 1 to Mem. Opp. G.C. MSJ, Tr. pp. 119-122).

The story begins with a petition the Union filed on September 13, 2016, in Case 08-RC-184028, seeking an election among a subset of Plant 2 employees from different departments. The petitioned-for unit was made up of "[a]ll full time and regular part time TICL4 (North) plant production (chemical operators, CRO's, step ups/relief operators), maintenance (mechanical, I&E, & planner), and South Plant warehouse employees. The Union withdrew its petition on September 22, 2016, shortly after Cristal submitted its statement of position outlining the reasons why the petitioned-for unit was inappropriate. (G.C. Ex. 6, Exs. 1 and 2). Four days later, on September 26, 2016, the Union filed its petition in the TiCl4 R-Case, seeking an election among

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TiCl4 R-Case that are part of the exhibit.

only TiCl4 operators, i.e., a subset of the unit named in the first petition, as well as a subset of Plant 2's production employees. (G.C. Ex. 1). Then, on November 21, 2016, the Union filed its third petition, in case 08-RC-188482, seeking an election involving only warehouse employees (the "Warehouse R-Case"), another subset of the unit named in the first petition. (G.C. Ex. 1 in Case 08-CA-200737).[2]

On October 4, 2016, a hearing was held in the TiCl4 R-Case to determine the appropriateness of the petitioned-for unit. On November 30, 2016, a hearing was held in the Warehouse R-Case to determine whether the petitioned-for unit in that case was appropriate. At the hearings on both petitions, the Company contended that the smallest and only appropriate unit was a wall-to-wall production, maintenance and warehouse unit.

Rejecting the Company's arguments, the Regional Director approved and directed separate elections among the employees in the units sought in the TiCl4 R-Case and the Warehouse R-Case. (G.C. Ex. 2; G.C. Ex. 2 in Case 08-CA-200737). The Union prevailed in each election. The Regional Director issued a Certification of Representative on December 1, 2016, in the TiCl4 R-Case, certifying the Union as the representative of the employees in the TiCl4 unit. On January 20, 2017, he issued a Certification of Representative in the Warehouse R-Case, certifying the Union as the representative of the employees in the warehouse unit. The Company requested review of the Decision and Direction of Election in both cases. (G.C. Ex. 6; G.C. Ex. 5 in Case 08-CA-200737). Over then Chairman Miscimarra's dissent, the Board denied the Company's Request for Review in the Warehouse R-Case on May 10, 2017, in a decision reported at 365 NLRB No. 74. (G.C. Ex. 6 in Case 08-CA-200737). It denied the Company's

[2] References to the exhibits to the General Counsel's Motion for Summary Judgment in Warehouse R-Case are abbreviated, "G.C. Ex. __ in Case 08-CA-200737," followed, where applicable, to references to the exhibits from the Warehouse R-Case that are part of the exhibit.

Request for Review in the TiCl4 R-Case on May 18, 2017, again over then Chairman Miscimarra's dissent, in a decision reported at 365 NLRB No. 82. (G.C. Ex. 7). The Company filed a Motion for Reconsideration in the Warehouse R-Case on May 24, 2017, and one in the TiCl4 R-Case on June 1, 2017. (G.C. Ex. 8; G.C. Ex. 7 in Case 08-CA-200737). The Board denied the Company's Motions for Reconsideration on June 27, 2017 (G.C. Ex. 9; G.C. Ex. 8 in Case 08-CA-200737).

On June 8, 2017, the Union filed its unfair labor practice charge in this case, arising out of the TiCl4 R-Case, and on June 15, 2017, it filed its charge in Case 08-CA-200737, arising out of the Warehouse R-Case, alleging in each charge that Cristal violated Section 8(a)(5) and (1) of the Act by failing to bargain with, and failing to furnish information to, the Union. (G.C. Ex. 12; G.C. Exs. 11-12 in Case 08-CA-200737). The Regional Director issued Complaints in each case, one in this case on June 23, 2017, and one in Case 08-CA-200737 on June 29, 2017. Cristal timely answered each Complaint and the General Counsel then filed identical motions for summary judgment in both cases on September 22, 2017. (G.C. Exs. 13-14; G.C. Exs. 13-14 in Case 08-CA-200737). Cristal moved to consolidate the cases on October 9, 2017, and on October 10, 2017, filed a memorandum in opposition to the General Counsel's motion in each case.

On December 15, 2017, the Board issued *PCC Structurals,* a 3-2 decision overruling *Specialty Healthcare,* under which the TiCl4 R-Case and Warehouse R-Case were decided, and reinstating the traditional community of interest test that preceded the test adopted in *Specialty Healthcare.* The Board's determination in *PCC Structurals* to overrule *Specialty Healthcare* and return to the traditional community of interest test provides the requisite special circumstances to remove this case from the reach of the longstanding rule, currently set out in Section 102.67(g)

of the Board's Rules and Regulations, prohibiting relitigation in a subsequent unfair labor practice case of an issue that was or could have been litigated in an underlying representation case. The decision, thus, provides Cristal with standing to move for summary judgment, and an order dismissing the General Counsel's Complaint, and vacating the certification issued to the Union in the TiCl4 R-Case. And as the discussion that follows demonstrates, when the facts of the TiCl4 R-Case are evaluated under the traditional community of interest test, the conclusion is inescapable that the relief Cristal requests is warranted.

II. STATEMENT OF FACTS

The following Statement of Facts is taken from Cristal's Request for Review in the TiCl4 R-Case and is presented verbatim to facilitate an assessment of Cristal's contention that a unit consisting of only the Plant 2 North TiCl4 operators is not appropriate under the traditional community of interest test.

Overall management responsibility for both Plant 1 and Plant 2 rests with Scott Strayer, the Ashtabula Complex General Manager. (G.C. Ex. 8, Ex. A, Ex. 2 Tr. p. 37, Ex. 1). Unlike at Plant 1, which consists of contiguous facilities, the process by which TiO2 is produced at Plant 2 is separated by the public road on which Plant 2 is located. On the north side of the road is what is referred to as the North Plant or Plant 2 North. On the south side of the road, kitty-corner from the North Plant, is what is referred to as the South Plant or Plant 2 South. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 44-49, Ex 5).

Plant 2 employs 220 employees. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. p. 34). The production process begins at Plant 2 at the North Plant where purified TiCl4 is created and transported by pipeline to the South Plant, where it is further processed into TiO2. During the production process at the South Plant chlorine is removed from the product, recycled and transported to the North Plant for re-use in the production process. Additionally, waste water from both the North

and South Plants is transported to a treatment facility physically located behind the North Plant. Upon completion of the TiO2 production process at the South Plant, the finished product is prepared for shipment in the warehouse at the South Plant. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 38-46).

At the North Plant, production employees (process technicians, a/k/a TiCl4 operators, and step up operators) work in four 7-person teams. Each team works 12-hour rotating shifts, with one 7-person team working at a time. Sixteen maintenance mechanics (including one step up maintenance mechanic), and 12 instrument and electrical ("I&E") technicians (including one step up I&E technician), work in the maintenance department at the North Plant. Twelve of the maintenance mechanics work a 7:00 a.m. to 3:30 p.m. schedule. The other four work a 12-hour rotating shift, with one each assigned to work the same hours as one of the four rotating North Plant operations teams. Eight of the I&E technicians work a 7:00 a.m. to 3:30 p.m. schedule, including the step up I&E technician, who works in both the North and the South Plant. The other four I&E technicians work a 12-hour rotating shift, with one assigned to work the same hours as one of the four rotating North Plant operations teams. They are responsible for instrument and electrical work during their shifts in both the North and the South Plant. All of the I&E technicians who work in either the North Plant or South Plant report to the same supervisor. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 50-66, Ex. 1).

At the South Plant, the Company employs four 13- or 14-person teams of operations department employees to complete the TiO2 oxidation, finishing and packaging processes. Like the operations employees at the North Plant, the teams work 12-hour rotating shifts, with one team working at a time. In the maintenance department at the South Plant, the Company employs 21 maintenance mechanics, and eight I&E technicians (besides those noted earlier who

work in both the North and South Plant). Seventeen of the maintenance mechanics work a 7:00 a.m. to 3:30 p.m. schedule. The other four work a 12-hour rotating shift, with one each assigned to work the same hours as one of the rotating South Plant operations teams. All the maintenance mechanics share the same supervisor, who reports to the maintenance superintendent. The eight I&E technicians work a 7:00 a.m. to 3:30 p.m. schedule. Again, there are four I&E technicians who work a 12-hour rotating shift, with one assigned at a time, to cover both the North and the South Plant. The South Plant and North Plant I&E technicians report to the same supervisor. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 50-109, Ex. 1).

The last phase of the production process occurs in the warehouse, where packaged TiO2 that has been moved to the warehouse by finished product operators is sealed and staged for shipment. Six hourly employees work in the warehouse, five warehouse persons and one warehouse lead. (Id).

III. ARGUMENT

A. Cristal Has Standing To Move For Summary Judgment On The Grounds The TiCl4 Unit Is Inappropriate Under *PCC Structurals*

Section 102.67(g) of the Board's Rules and Regulations recites a long-established policy of the Board generally not to permit relitigation in a related unfair labor practice case of an issue that was or could have been litigated in a representation case. It reads in full:

> The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

The Board recognizes two exceptions to this rule, one for newly discovered, previously

unavailable evidence, and one for special circumstances. *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162 (1941); *Duke University,* 311 NLRB 182 (1993); *Heuer International Trucks,* 279 NLRB 127 (1986); *Sub-Zero Freezer Co.,* 271 NLRB 47 (1984) (dismissing complaint, vacating decision in representation case, revoking union's certification and remanding case to regional director based upon special circumstances). The Board has also found that it has the power, in the absence of newly discovered, previously unavailable evidence or special circumstances, to reconsider in a technical 8(a)(5) test of certification case a determination in the underlying representation case under a newly-adopted legal standard. *St. Francis Hospital,* 271 NLRB 948 (1984) (dismissing complaint and remanding case to regional director for consideration under newly-adopted legal standard).

Here, *PCC Structurals* provides the Board both special circumstances and cause *sua sponte* to reconsider the unit determination in the TiCl4 R-Case. Support for the Board's reconsidering the unit determination in this case is provided by action the Board took within a week of its issuance of *PCC Structurals* in a case pending before the District of Columbia Court of Appeals, *Volkswagen Group of America v. NLRB,* Case No. 16-1309. In that case the Board filed a motion with the Court, which the Court granted, asking the Court to remand its *Specialty Healthcare*-based decision to the Board for reconsideration under *PCC Structurals.* (a copy of the Board's Motion is attached as Exhibit A). The General Counsel too has determined that *PCC Structurals* provides the requisite extraordinary circumstances to revisit unit determinations or election agreements made prior to the case's issuance in pending representation cases. In Memorandum OM 18-05, Associate General Counsel Beth Tursell advised all Regional Directors, Officers-in-Charge and Resident Officers that the "modification of extant law by the Board in *PCC* constitutes such an 'unusual' or 'extraordinary' change in circumstances as to

warrant reconsideration of the propriety of a bargaining unit defined under a stipulated or consent election agreement or decision and direction of election in a currently active case." (a copy of the Memorandum is attached as Exhibit B).

This case should be treated the same as a test of certification case like *Volkswagen,* which was post-oral argument and pending for a decision in the court of appeals when the Board moved to remand it, and all pending cases in which unit decisions were issued or agreements made under *Specialty Healthcare.* Among its other arguments, Cristal argued in its Statement of Position in the TiCl4 R-Case that the unit of TiCl4 operators sought by the Union violated Section 9(c)(5) of the Act and that the standard adopted in *Specialty Healthcare* violated Section 9(b), which were among the reasons the Board gave for overruling *Specialty Healthcare* in *PCC Structurals.* (G.C. Ex. 7 in Case 08-CA-200737, Ex. A, pp. 6-8, and 13). Cristal repeated and expanded upon those arguments in its Request for Review (G.C. Ex. 6). Cristal, thus, preserved the arguments for review, making this case ripe for reconsideration under *PCC Structurals.*

B. When Evaluated Under The Traditional Community Of Interest Test, The Evidence Establishes That A Unit Of TiCl4 Operators Is Inappropriate And The Smallest Appropriate Unit Is One Consisting Of All Plant 2 Production, Maintenance And Warehouse Employees

In describing the traditional community of interest test to which it returned in *PCC Structurals,* the Board quoted the following passage from *United Operations, Inc.,* 338 NLRB 123 (2002), stating the passage captures what the test requires the Board to determine in each case, which is:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Explaining how the analysis under this test is conducted, the Board added:

> In weighing both the shared and the distinct interests of petitioned-for and excluded employees, we take guidance from the Second Circuit's decision in *Constellation Brands* [*Constellation Brands, U.S. Operations, Inc. v. NLRB,* 842 F.3d 784 (2d Cir. 2016)]. Thus, we agree with the Second Circuit that the Board must determine whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Constellation Brands*, supra at 794. Having made that determination—applying the Board's traditional community-of-interest factors recited above—the appropriate-unit analysis is at an end.

365 NLRB No. 160, slip op. at p. 11.

Using the *PCC Structurals* method of analysis here demonstrates that the shared interests the TiCl4 operators have with production, maintenance and warehouse employees on a Plant 2-wide basis far outweigh the scant separate interests TiCl4 operators share amongst themselves.

1. The TiCl4 Operators Do Not Have Sufficient Shared Interests To Find They Have A Distinct Community Of Interest Apart From Plant 2 Production, Maintenance And Warehouse Employees

In applying the first prong of the *Specialty Healthcare* framework, the Regional Director, found that the TiCl4 operators were "readily identifiable as a group" because they "work in the same location, perform the same function, and hold the same classification." He then found that they "share a community of interest under the Board's traditional criteria" for each of those reasons as well as because they "work under commons supervision," "are paid the same wage rate, receive the same benefits, have similar skills and training requirements, and are subject to the same Employer policies," and "[t]heir work has a shared purpose and is functionally integrated" in that they "work together in teams" "to produce TiCl4" and "are trained to become qualified in major areas of the process." (G.C. Ex. 2, p.9). Significantly, the Regional Director skipped a step that *Specialty Healthcare* on paper required and *PCC Structurals* makes the focus

of the analysis, i.e., whether the TiCl4 operators "share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." 365 NLRB No. 160, slip op., p.7. An objective analysis of that question under the undisputed facts demonstrates the TiCl4 operators fall well short of sharing the requisite separate and distinct community of interest.

Starting the analysis with the Regional Director's findings, the evidence proves that some of those findings do not materially distinguish the TiCl4 operators from other Plant 2 employees, while the balance do not distinguish them at all.

1. *Work Location.* The Regional Director's finding that the TiCl4 operators work in the same location is only accurate if read to mean that most of them perform their primary duties at the North Plant. It is misleading and inaccurate, however, to the extent it connotes that they work side-by-side or even in close proximity to each other at the North Plant. The facts show that they do not. Each works at different locations, away from where other TiCl4 operators work. To illustrate, one of the seven operators on each rotating 12-hour shift works outside in the ore, coke and chlorine area of the North Plant and also at locations away from the plant, including the "Ashco Pond," which is near "C Plant," and the "A Plant"; one works outside in the chlorination and condensation area of the North Plant; one works outside in the purification area of the plant and the areas where TiCl4 shipments are loaded for shipment to third parties; one works primarily at the waste water treatment plant, which serves both the North Plant and the South Plant; one works inside the North Plant in the control room; and two work as relief operators. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 69-75, Ex. 5).

2. *Job Functions.* The Regional Director did not explain what was meant by the finding that the TiCl4 operators perform the same function but whatever it was, the record does

not support the finding. The TiCl4 operators perform discrete functions from one another based upon their work location. The operator in the ore, coke and chlorination area works, while in that area, checking processes and controls and unloading product, at the Ashco Pond checking pond levels and pumping equipment, and at Plant A checking effluent water; the operator in the chlorination and condensation area monitors processes and controls; the operator in the purification area operates the purification system and loads TiCl4 for shipment to third parties; the operator at the waste water treatment plant works as an effluent operator running a neutralization system; the operator in the control room operates the control boards; and the two relief operators relieve operators working in areas for which the relief operators are qualified. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 69-75).

3. *Job Classification.* The Regional Director was correct that TiCl4 operators work in the same job classification, i.e., "Chemical Operator"; however, he neglected to mention that their counterparts at the South Plant work in that same classification. (Cristal TiCl4 R-Case Ex. 21, attached as Exhibit C).

4. *Supervision.* The TiCl4 operators have common front line and second level supervision, but at the third level, the level of the Manager of Operations and Maintenance, it merges with all production and maintenance employees at Plant 2. (G.C. Ex. 8, Ex. A, Ex. 2, Ex. 1).

5. *Wages and Benefits.* The TiCl4 operators are, as found by the Regional Director, all paid the same wage rate; however, the Regional Director omitted that they are paid under the same wage scale as other Plant 2 production, maintenance and warehouse employees and that their pay rate is the same as the pay rate of their Chemical Operator counterparts at the South Plant. They also all receive, again as the Regional Director found, the same benefits, but those

benefits are the same as all production, maintenance and warehouse employees receive. (Exhibit C; G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 179-187, 210, Ex. 11).

6. *Skills and Training.* The TiCl4 operators have, in most cases, similar skills and similar training requirements; however, many South Plant production employees have skills comparable to them (especially those who have worked as TiCl4 operators) and participate in a training process that is similar to that in which TiCl4 operators participate. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 67-68).

7. *Employer Policies.* That the TiCl4 operators are each subject to the same Company policies does not distinguish them – all Plant 2 production, maintenance and warehouse employees are subject to those policies. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 180-224, Exs. 7, 13).

8. *Functional Integration.* The Regional Director's finding that the work of the TiCl4 operators has a shared purpose and is functionally integrated toward the production of TiCl4 is only partially true. In particular, the finding that the operators work in teams to produce TiCl4 disregards the evidence that they work alone and in discrete areas, that one performs duties off-site at Ashco Pond (which supplies water to all of Plant 2, among other locations) and at A Plant, and that another works at the waste water treatment plant for both the North and South Plant. More importantly, the Regional Director's finding that the work the TiCl4 operators perform is functionally integrated toward the production of TiCl4 overlooks that the functions they perform are functionally integrated with Plant 2's overall mission – the production of TiO2 for sale to the Company's customers. Cristal's structure requires production, maintenance, and warehouse employees to work together toward that objective and demonstrates that Plant 2 is highly integrated. Each phase of the production process is inextricably linked to the other

phases. That is perhaps best illustrated by the fact that if the TiCl4 operation shuts down, the rest of Plant 2 must also stop working; similarly, if any phase of the production process is shutdown at the South Plant, the North Plant must also shutdown. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 95, 97-98, Ex. 13(N)). Because of the integration of all operations, employees at both plants must regularly interact to ensure appropriate lockout/tagout procedures are completed and to ensure appropriate safety measures are taken when repairing machinery. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 79-87, Exs. 13(O) and (P).

Beyond these considerations, a host of other undisputed facts show TiCl4 operators do not have meaningfully distinct interests apart from the excluded production, maintenance and warehouse employees. They include the following:

1. *Shared Use of North Plant Facilities.* The TiCl4 operators and the North Plant maintenance and I&E employees use the same parking lot, same entrance to the facility, and same locker room. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 59-60).

2. *Permanent Interchange.* At Plant 2, a production employee's normal career progression starts at Plant 2 South. Next, an employee is usually awarded a bid[3] as a TiCl4 operator at Plant 2 North. Employees then sometimes return to a position at Plant 2 South or move into the warehouse. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 87-89, 198-200, Ex. 19). Of the five employees who worked in the warehouse as warehouse persons at the time of the hearing, all of them previously worked as a finished product operator at the South Plant and three of them previously worked as a chemical operator at either the North or South Plant. (G.C. Ex. 8, Ex. A, Ex. 2, Exs. 19-20, 22).

3. *Production Employee Temporary Interchange in the Warehouse.* A number of

[3] At Plant 2, all available positions are posted for bid. Bids are awarded based on overall company seniority. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 180-224, Ex. 7).

Plant 2 production employees from both the North Plant and the South Plant regularly work overtime in the warehouse alongside warehouse employees. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 113-114, Ex. 22).

4. *Maintenance Employee Interchange Between Plants.* Plant 2 maintenance employees are permitted to work at both the North and South Plants and many regularly work at both plants. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. p. 106).

5. *Contact and Interaction Between Production and Maintenance Employees.* Plant 2 production and maintenance employees regularly interact with each other, particularly on maintenance repairs and issues that require diagnostics, troubleshooting, and the lockout-tagout of equipment and sources of energy. Indeed, the record shows that at the North Plant, a TiCl4 operator who works in the field appears to interact more with maintenance employees than with other TiCL4 operators. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 79-87, Exs. 13(O) and (P).

6. *Contact and Interaction Between North and South Plant Production Employees.* Production employees who work in the control rooms at the North and South Plant are able to view the control screens for both plants, and communicate with each other to determine appropriate production levels and identify issues in the production process, including during the 12-15 downtime events each month. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 93-95). North and South Plant operators regularly take samples to the lab (located at the South Plant) to be tested, resulting in their occasionally coming into contact with each other. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 110-111).

7. *Participation and Contact Serving on Voluntary Workplace Committees.* Plant 2 production, maintenance, and warehouse employees participate on the same voluntary workplace committees. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 115-117, Ex. 23).

8. *Common Services.* All Plant 2 production, maintenance and warehouse employees fall under the umbrella of the same group of shared services, including engineering, process control, finance, procurement, environmental services, safety service, labor relations (human resources), information technology, and procurement. In particular, there is common control over all labor relations functions at the North Plant and the South Plant. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 118-123).

9. *Safety Equipment.* Plant 2 production, maintenance, and warehouse employees utilize the same standard safety equipment. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. p. 90).

10. *Uniform Policy.* Plant 2 production, maintenance, and warehouse employees are covered by the same uniform policy. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. pp. 211-212, Ex. 13(J).

11. *Orientation.* The onboarding and orientation process for Plant 2 production, maintenance, and warehouse employees is virtually identical. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. p. 209, Ex. 11).

12. *Recording Hours Worked and Payday.* All Plant 2 production, maintenance, and warehouse employees record their time in the same manner and are paid on the same date. (G.C. Ex. 8, Ex. A, Ex. 2, Tr. p. 212).

In applying the traditional community of interest test, the Board has a long history of holding on facts analogous to those presented here that a petitioned-for subset of employees comparable to the TiCl4 unit here is inappropriate, finding in those cases that the employees in the proposed unit did not share the requisite separate and distinct community of interest to form a standalone unit. The following cases are illustrative.

In *Peerless Products Company,* 114 NLRB 1586 (1955), the petitioner and intervenor sought a unit limited to the employer's production department, while the employer contended

that only a plantwide unit was appropriate. The Board agreed with the employer and dismissed the petition based upon evidence of employee interchange between departments, the interrelationship of the employees' work, and the petitioner's representation of employees of other employers in units that included employees besides production employees. It was of no moment to the Board that the different employee groups of the employer worked at different locations. The Board said the "difference in the situs of employment of the employee groups here involved does not necessarily determine . . . that they do not have a community of interest in their employment." It also did not make a difference to the Board that production employees were paid differently from employees in other groups. The only factor the Board found that supported the petitioned-for unit was the extent of the petitioner's and intervenor's organization of employees. The Board commented, however, that "extent of employee organization is not, standing alone, a proper determinant of a bargaining unit" and may not be "the controlling factor in such determination. 114 NLRB at 1588. *See also, Birdsall, Inc.,* 268 NLRB 186, 190 n.14 (1983).

In *North American Rockwell,* 193 NLRB 983 (1971), the union sought an election in a unit limited to technical employees employed in one payroll group at one of five divisions of the employer's aerospace and systems group, or alternatively all technical employees at the division. The employer contended that the only appropriate unit had to include employees from all five divisions and, alternatively, that a unit could not be appropriately limited to technical employees from the one payroll group. Finding, among other things, that the employer's operations at the five divisions were highly integrated and centralized and that the employer employed technical employees at each division who worked in classifications and performed work similar to the petitioned-for employees, the Board held both alternative petitioned-for units to be inappropriate.

In doing so, the Board explained:

> It has long been held that employees possessing similar interests in terms and conditions of employment must be afforded the same treatment for purposes of unit placement. [W]e find that the group of employees requested by the Petitioner comprises only a small segment of a large group of unrepresented employees who perform similar work, hold similar classifications, and have similar interests. Furthermore, the Employer's operations are highly integrated and centralized and collective bargaining for all the Employer's represented employees in the Los Angeles area has always been on a multidivision basis.

193 NLRB at 984.

In *Neodata Product/Distribution,* 312 NLRB 987 (1993), the union petitioned for an election in a unit consisting of all employees employed at one of two facilities of the employer in Des Moines, Iowa, which was located approximately three miles from the second facility. The employer, which was engaged in the product distribution business for the direct marketing industry, contended the only appropriate unit was one that included employees at both facilities. The Board agreed with the employer, basing its decision on the following considerations:

- The facilities were functionally integrated and effectively operated as a single unit, as reflected by employees at each facility fully and equally participating at the various stages of the employer's overall production process to accomplish the employer's ultimate production goals, and linkage of the facilities by a common computer system, facts which the Board found demonstrated that, despite being physically separate from each other, employees at both facilities constituted "integral and indispensable parts of a single 'order flow process'";

- Various employees from each facility had personal, telephone, and facsimile contact from time to time with employees from the other facility;

- Employees were able to transfer from one facility to the other, and bid on posted jobs at each facility;

- Employees at both facilities received the same fringe benefits; and

- The employer's director of operations had overall responsibility for daily operations and labor relations policy.

312 NLRB at 988-989.

In *Seaboard Marine, Ltd.,* 327 NLRB 556 (1999), the Board held to be inappropriate a petitioned-for unit of trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks employed at the Port of Miami Terminal Facility. The Board determined that the smallest appropriate unit had to also include employees who performed similar clerical and inspection tasks as those performed by the employees in the petitioned-for unit. That included dispatch employees, boarding agents, inbound coordinators, parts/purchasing clerks, and stevedore coordinators. In arriving at its holding, the Board found that there was "a high degree of functional integration in [the employer's] operations and that work performed by [the petitioned-for] employees [was] directly related to and integrated with the work of the majority, if not all, of the Employer's remaining employees." 327 NLRB at 556. The Board, thus, concluded that the work performed by the employees in the petitioned-for unit was "not so dissimilar from the duties of many other classifications to warrant separate representation." Id. It also discounted the fact that the employees in the various classifications had separate immediate supervision because "the Employer [maintained] a system of wage levels that [were] applied companywide, as well as fringe benefits, work and safety rules, and personnel policies and practices that [were] applied uniformly." Id.

In *The Boeing Company,* 337 NLRB 152 (2001), the union petitioned for an election in a unit consisting of "recovery and modification employees, including mechanics, tools and parts attendants, and quality assurance employees employed by the employer at the Charleston, South Carolina Air Force Base. The employer maintained that the smallest appropriate unit needed to include all production and maintenance employees employed at the Base. The regional director approved the petitioned-for unit, finding the unit to be appropriate because the employees in the unit worked on different equipment than other employees, were geographically separate from

other employees, and had minimal contact or interchange with other employees. The Board reversed that finding, determining that the petitioned-for employees did not possess the requisite separate and distinct community of interest from the other employees to constitute an appropriate unit. The factors that led the Board to that conclusion were that (1) the petitioned-for employees possessed similar skills, received similar training, and did similar work as the other employees, (2) the work performed by the other employees was highly integrated with the work performed by the petitioned-for employees, and (3) all employees received the same benefits, were subject to the same personnel policies, received comparable wages, shared a common lunch area and occasionally permanently transferred into each other's group. Explaining why it disagreed with the regional director's finding, the Board commented:

> We recognize that the [petitioned-for] employees are separately supervised, attend separate employee meetings, work in a separate area from [the other employees], and never temporarily transfer into the [other work groups]. These distinctions, however, are offset by the highly integrated work force, the similarity in training and job functions between [the employees], and the comparable terms and conditions of employment among all [the] groups.

337 NLRB at 153.

In *Publix Super Markets, Inc.,* 343 NLRB 1023 (2004), the union petitioned for elections in three separate units at the employer's Deerfield Beach, Florida distribution facility (1) a fluid processing unit made up of employees involved in the processing and bottling of milk, soda, juice and water, and the manufacture and bagging of ice, (2) a unit of warehouse employees who used the "Dallas" computer system to track the movement of product through the warehouse, and (3) a unit of all other warehouse employees involved in warehousing bulk grocery items. The employer contended that the smallest appropriate unit was a wall-to-wall production and maintenance unit. The regional director disagreed with both the union and the employer, finding two units to be appropriate, a fluid processing unit broader than the one petitioned-for, and a

distribution unit made up of "Dallas/non-Dallas" warehouse employees plus some additional employees. The regional director excluded pallet repair, dispatch and garage employees at three nearby satellite facilities, but included spotter/jockeys, who were included among the employees the union sought in the petitioned-for non-Dallas unit. On the employer's request for review, the Board reversed, agreeing with the employer that the smallest appropriate unit was a plantwide production and maintenance unit, including all employees who worked in the satellite buildings.

In finding a production and maintenance unit to be the smallest appropriate unit, the Board relied upon evidence showing: (1) the entire complex, in a variety of respects, was functionally integrated, (2) the functional integration resulted in a "significant amount of work-related contact" among employees in the fluid processing area and distribution area, (3) a significant number of permanent transfers had occurred between the fluid processing and distribution areas, and there had also been temporary interchange between fluid processing and distribution employees, (4) even if their responsibilities were not the same, the skills and duties of employees in both areas were relatively similar, and (5) all employees at the facility had substantially the same wages, benefits, work rules and policies, and other terms and conditions of employment. The only factor the Board cited that provided any support for the regional director's decision was that the fluid processing and distribution operations were in separate business units, which created a distinction between them in terms of supervision and control of labor relations. The Board determined, however, that "the other factors demonstrating the community of interest between the two groups of employees outweigh this distinction." 343 NLRB at 1026-1027.

Besides these cases, support for a finding that a unit limited to TiCl4 operators is inappropriate may also be gleaned from *Aztar Indiana Gaming Co.,* 349 NLRB 603 (2007)

(petitioned-for unit of beverage department employees found inappropriate and smallest appropriate unit found to consist of beverage, catering and restaurant employees); *Buckhorn, Inc.,* 343 NLRB 201 (2004) (petitioned-for unit of maintenance employees found to be inappropriate based upon, among other factors, highly integrated nature of employer's production process and common working conditions and employment terms of all employees); *Hotel Services Group,* 328 NLRB 116 (1999) (petitioned-for unit of licensed massage therapists, apart from other licensed employees, not appropriate); *Aurora Fast Freight, Inc.,* 324 NLRB 20 (1997) (petitioned-for unit of office clericals limited to one office inappropriate).

Two cases decided under the *Specialty Healthcare* standard also support a finding a unit limited to TiCl4 operators is inappropriate. In *A.S.V., Inc*., 360 NLRB 1252 (2014), the Board found that the petitioned-for unit, which consisted of only a select portion of the facility's production employees, did not constitute a distinct, homogenous group of employees that would warrant granting the union's request for a separate unit. The petitioned-for group of employees were primarily responsible for completing one specific portion of the production process. Those employees were subject to the same handbook, working conditions, benefits, wages and work rules as the remainder of the production department. The Board found the petitioned-for unit was not appropriate because it was not a distinct group of employees. The Board based that finding on the highly integrated nature of the employer's operation, finding "no rational basis for excluding some assembly [i.e. production] employees while including other assembly employees." 360 NLRB at 1255.

In *Neiman Marcus*, 361 NLRB 50 (2014), another case decided under the *Specialty Healthcare* standard, the union sought to organize employees working in the second floor salon shoe department of the company's multi-floor, Manhattan store and the contemporary footwear

employees working on the fifth floor of the store, who themselves were a subset of the larger contemporary sportswear department. The Board held the petitioned-for unit was fractured because it did not constitute a true "departmental unit" that included the entire group of employees who shared a community of interest.

In summary, measuring the evidence presented in the TiCl4 R-Case under the traditional community of interest test, as applied in the foregoing cases, leads to but one conclusion and that is that the TiCl4 unit in which the Regional Director directed an election was inappropriate and the smallest appropriate unit is one consisting of all Plant 2 production, maintenance and warehouse employees.[4]

2. The History Of Dealings Between Cristal And The Steelworkers Supports A Finding That The Smallest Appropriate Unit Is A Production, Maintenance And Warehouse Unit

The Board recognizes that collective bargaining history is a relevant factor in determining the appropriateness of a petitioned-for unit. The underlying rationale behind recognizing bargaining history as a factor is that the Board is "reluctant to disturb bargaining units which have been established by the mutual agreement of the parties and in which there have been long histories of continuous and harmonious collective bargaining." *St. Joseph Hosp. & Med. Ctr.*, 219 NLRB 892, 893 (1975). Although no history of collective bargaining exists at Plant 2, the Steelworkers' longstanding representation of the production and maintenance unit at Plant 1 and the prior efforts by the Steelworkers to organize a production and maintenance unit at Plant 2

[4] Then Chairman Miscimarra's dissent from the decision denying Cristal's Request for Review in the TiCl4 R-Case reflects he would have arrived at that conclusion. In his opinion, the functional integration of the North and South Plants, the interchange between production and warehouse employees, and the shared terms and conditions under which employees at both plants work raised substantial questions "regarding whether the unit consisting exclusively of Plant 2 North production employees erroneously disregards or discounts the community of interests these employees share with Plant 2 South production and warehouse employees and promotes instability by creating a fractured or fragmented unit." 365 NLRB No. 82 at p.2

lend further support to a finding that only a wall-to-wall unit is appropriate at Plant 2.

3. A Unit Consisting Of Only TiCl4 Operators Is Not Conducive To Effective Collective Bargaining.

The Board has long held that part of its mission is to create efficient and stable collective bargaining relationships. *See Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962). Section 9(b) of the Act requires the Board to approve appropriate bargaining units "in each case" that assure employees the "fullest freedom in exercising the rights guaranteed by" the Act. 29 U.S.C. § 159(b). Historically, in the manufacturing industry, the Board has recognized that it must balance the realities of an employer's business, and how a unit might impact the employer's operations, against the need for bargaining rights, industrial peace and stability. As a result, the Board has consistently found that wall-to-wall production, maintenance, and warehouse units are presumptively appropriate. See *Gourmet, Inc., d/b/a Jackson's Liquors*, 208 NLRB 807m 808 (1974) ("The employerwide unit … is presumptively appropriate."); *Kalamazoo Paper Box Corp*., 136 NLRB 134, 136 (1962) ("A plantwide unit is presumptively appropriate under the Act. And a community of interest inherently exists among such employees.") Specifically, in *Kalamazoo Paper Box Corp.,* the Board recognized the need to balance business realities and the need for bargaining rights, industrial peace and stability:

> Because the scope of the unit is basic to and permeates the whole of the collective- bargaining relationship, each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

136 NLRB 134, 137 (1962) (internal citations omitted). The Board wanted to avoid:

> . . .creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to 'assure to

> employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b).

Id. at 139-40. The "chaos" the Board wanted to avoid is the artificial result employers experience when unions carve out micro units from their production process. The Board has long recognized that each unit determination must have direct relevance to the circumstances under which collective bargaining is to take place. *American Cyanamid Co.*, 131 NLRB 909, 911 (1961). Under the Act, the Board must apply a functional approach that examines how the requested bargaining unit impacts the operation of Cristal's business.

In this case, the elevation of job titles and classifications, over Cristal's integrated and functional team approach, created a bargaining obligation for a group of employees that have no meaningfully distinct characteristics apart from other production employees, and the maintenance, and warehouse employees at Plant 2. Unless the unit determination is overturned, Cristal will have a bargaining obligation for a small, fractured group of employees. This artificial division will impact Cristal's team approach by isolating the TiCl4 operators from the other production employees and the maintenance and warehouse employees through separate bargaining and potentially different terms and conditions of employment.

The Company created a stable, integrated manufacturing process in which all production, maintenance, and warehouse employees work, have the same rules, have the same benefits and work under the same compensation structure. The gerrymandered unit of TiCl4 operators would break this structure apart and create a risk that this small group of operations employees could shut down production for both plants and put the unrepresented hourly employees out of work.

IV. CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in Cristal's Answer to the Complaint in this matter and in Case 08-CA-200737, and in the record in TiCl4 R-Case and the

Warehouse R-Case, Cristal respectfully requests that the Board grant the Company's Cross Motion for Summary Judgment and issue an Order dismissing the Complaint in this case with prejudice, revoking the Certification of Representative in the TiCl4 R-Case, and dismissing the Union's Petition in the TiCl4 R-Case.

Respectfully submitted,

/s/ David A. Kadela

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CERTIFICATE OF SERVICE

I certify that the foregoing *Cristal USA, Inc.'s Cross Motion for Summary Judgment and Memorandum in Support Thereof* was electronically filed on February 16, 2018, through the Board's website, is available for viewing and downloading from the Board's website, and will be sent by means allowed under the Board's Rules and Regulations to the following parties:

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